Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANKLIN RODRIGUEZ DELGADO, ET AL.,

Petitioners,

v.

SHELL OIL CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO COUNTERSTATEMENTS OF FACT 1

REPLY TO ARGUMENTS IN OPPOSITION 2

I. THE CONFLICT AMONG THE COURTS ON TIERING IS IRRECONCILABLE 2

A. *Gates* is not Limited as Respondents Suggest 2

B. Courts and Commentators Addressing Tiering Do not Limit *Gates*, but Instead Acknowledge the Existence of a Conflict 5

C. There is No Other Reason to Deny Review 6

II. THE REMOVAL PROCEDURE QUESTION WARRANTS REVIEW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932 (7th Cir. 1996) 5

Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999) 5

America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989) 4

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 1

Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806 (5th Cir.), cert. denied, 506 U.S. 955 (1992) 2

Bilek & Purcell v. Paderwerk Gebr. Benteler GmbH & Co., 694 S.W.2d 225 (Tex. App. 1985, no writ) 9

Chick Kam Choo v. Exxon Corp., 817 F.2d 307 (5th Cir. 1987) 2

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 2

In re Clearsky Shipping Corp., 1999 WL 1021825 (E.D. La., Nov. 8, 1999) 6

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995) 2, 3, 4, 5, 7

Linton v. Airbus Industrie, 934 S.W.2d 754 (Tex. App. 1996), cert. denied, 525 U.S. 1145 (1999) 6

Massachusetts v. Bowen, 487 U.S. 879 (1988) 8

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) 9, 10

Patrickson v. Dole Food Co., No. 97-01516HG (D. Haw., Sept. 9, 1998) 3, 4, 6, 7

TABLE OF AUTHORITIES – Continued

Page

Procter & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F.Supp.2d 644 (W.D. Tenn. 1998) 2

Southern Ocean Seafood Co. v. Holt Cargo System, Inc., 1997 WL 539763 (E.D. Pa. 1997) 7

Straub v. A.P. Green, Inc., 38 F.3d 448 (9th Cir. 1994) 4

Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1989) 4

STATUTES:

28 U.S.C. § 1441(d) 10

OTHER AUTHORITIES:

The Bluebook: A Uniform System of Citation 23 (17th ed. Harv. L. Rev. Ass'n 1991) 5

Sunil R. Harjani, Comment, *Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 Nw. J. Int'l L. Bus. 181 (1999) 6

John B. Oakley, *Prospects for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855 (1998) 6

Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, 73 Fla. B.J. 48 (1999) 6

REPLY TO COUNTERSTATEMENTS OF FACT

The opposition brief of the Dole defendants goes to great length to set forth the history of cases involving the pesticide dibromochloropropane (DBCP). This history is irrelevant here, but to whatever extent the Court is interested in past DBCP litigation, several things are worth noting. None of the defendants, including the present respondents, has ever been subject to jurisdiction in the foreign countries. The many foreign plaintiffs who have had the temerity to sue respondents for involuntarily sterilizing them have sued the defendants in the only place they could – the defendants' home country – and forum non conveniens dismissal was available not by any defendant's amenability to suit abroad, but by these American defendants' eager, voluntary submission to foreign jurisdiction.

The plaintiffs involved were chemically castrated by respondents' continued sale and use of a pesticide banned in the United States because it was found conclusively to cause testicular atrophy, sterility and cancer. Upon the United States suspension, the Dole defendants, recognizing the hazards of the product's continued use, agreed to indemnify other respondents to ensure a continued supply, but ordered foreign plantation managers not to follow precautions recommended by those respondents. Notwithstanding the various forum non conveniens dismissals recited by the Dole defendants, these and other respondents have recognized their responsibility to virtually all of the claimants involved, by the payment of settlements.

Petitioners were perfectly free to file their cases in Texas, home to the world headquarters of two defendants, and were proper plaintiffs in state court in terms of jurisdiction and venue. That Texas had an unusual forum non conveniens rule which afforded petitioners a day in court, and that the Texas Legislature specifically granted a period in which to sue before changing that law, is of no moment. *American Dredging Co. v. Miller*, 510 U.S. 443,

453-54 (1994). Nor does it affect decisions about jurisdiction and remand. *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir.) (reversing denial of motion for remand and noting that "[t]he state court might not apply the same doctrine of forum non conveniens as a federal court would, but this possibility does not change our result."), cert. denied, 506 U.S. 955 (1992). Indeed, this Court reversed an incorrect Fifth Circuit construction of the Anti-Injunction Act which had the effect of depriving foreign plaintiffs of their rights under the Texas forum non conveniens law, even while noting that "it is possible that 'Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else.' " *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1988), quoting *Chick Kam Choo v. Exxon Corp.*, 817 F.2d 307, 314 (5th Cir. 1987).

REPLY TO ARGUMENTS IN OPPOSITION

I. THE CONFLICT AMONG THE COURTS ON TIERING IS IRRECONCILABLE

A. *Gates* is not Limited as Respondents Suggest.

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995), drew absolutely no distinctions between cases where there is indirect ownership by the sovereign through an intermediate corporation, and cases where the ownership is through an organ (or to put it respondents' way, cases in which there is no indirect "ownership" because the intermediate entity is an organ rather than a corporation capable of being owned).[1] *Gates*

[1] Respondents accuse petitioners of "grievously err[ing]" in characterizing the entity in question in *Gates* as ultimately being owned by the Canadian government. Yet that is exactly the common-sense way in which the case has been read. See *Procter & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F.Supp.2d

rejected *any* form of tiering at all, because it would expand immunity down a potentially limitless corporate chain. Respondents' argument about *Gates* is a distinction without a difference.

The *Gates* court was concerned only with whether the party in question was owned by one of the entities designated in the Act as the only proper owners – foreign states or their political subdivisions. *Gates* did not distinguish between the different ways that a *parent* might achieve its "agency or instrumentality" status precisely because it excluded, as does the plain language of the Act, *all* agencies or instrumentalities from the class of eligible parents. In so doing, Congress and the *Gates* court foreclosed respondents' argument that there is an exception to the no-tiering rule, in cases where the parent is a majority-owned corporation rather than an organ:

> Indeed, our reluctance to put words in Congress' mouth is especially justified here because Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision *or an agency or instrumentality* of a foreign state or political subdivision. It did not.

54 F.3d at 1462 (emphasis added). That *Gates* does not turn on the status of the parent is perhaps best demonstrated by its application to the Dead Sea entities by a district judge in the Ninth Circuit. The court in *Patrickson v. Dole Food Co.*, No. 97-01516HG (D. Haw., Sept. 9, 1998) rejected the same argument made by the same parties that are respondents here, and clearly recognized that *Gates* is not limited in the manner respondents assert:

644, 654 n.9 (W.D. Tenn. 1998) (describing *Gates'* holding as "state's ownership of entity that owned majority of corporation in question was insufficient.")

> The language in *Gates* clearly encompasses both organ and majority shareholder status. See *Gates*, 54 F.3d at 1462. . . . Additionally, the Ninth Circuit's reference in *Corporacion Mexicana* that the ownership test of § 1603(b)(2) applies only to the first tier of ownership is compelling. *Corporacion Mexicana*, 89 F.3d at 655. Had the Ninth Circuit intended to limit the ownership test of § 1603(b)(2) to organ situations, it would have specifically limited its holdings.

Id. at 13-14 (App. 192). Respondents also argue that the Ninth Circuit itself must have meant to limit *Gates* in the manner they suggest, because otherwise *Gates* would conflict with three earlier decisions in which the court "accepted" tiered ownership (Dead Sea opposition at 10). But none of these cases addressed the tiering issue, because no party raised it. In *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994), the issue was the timing of the state's ownership. *Id.* at 450. In *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989), the entities in question challenged personal jurisdiction by asserting that none of the exceptions to the FSIA's presumption of immunity applied. *Id.* at 1411-12. And in *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989), it was "undisputed" that the defendants were foreign states. *Id.* at 796. The *Patrickson* court dismissed this argument as well, when it noted that "[w]hile there are cases in the Ninth Circuit where the court has allowed a corporation that is indirectly owned by a foreign state to maintain foreign state status, there was no reference to the issue now before this Court. In fact, the cases came to the court with a presumption of foreign state status, and the court was requested to decide other issues." *Patrickson*, supra at 16 (App. 195), citing *America West Airlines* and *Straub*.

The Fifth Circuit also clearly believed that *Gates* is irreconcilable. The court did not even attempt to distinguish *Gates*, and certainly did not draw the distinction respondents contend for here. Moreover, the conflict with *Gates* was explicitly acknowledged by the Fifth Circuit,

with its "but see" citation. App. 23. The Dole defendants complain that "[t]his fleeting reference hardly acknowledges a conflict with *Gates*," but the Fifth Circuit's use of the "but see" signal means precisely that it reads *Gates* as "clearly support[ing] a proposition contrary" to the Fifth Circuit's conclusion. See *The Bluebook: A Uniform System of Citation* 23 (17th ed. Harv. L. Rev. Ass'n 1991).

B. Courts and Commentators Addressing Tiering Do not Limit *Gates*, but Instead Acknowledge the Existence of a Conflict

Like the Fifth Circuit, the Seventh Circuit also made no mention of respondents' supposed distinction, when it allowed tiering and refused to follow *Gates*. Instead, the court simply took the opposite view, and explicitly disagreed with the Ninth Circuit's reasoning. *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 940-41 (7th Cir. 1996). Moreover, none of the district court cases that reject *Gates* draws respondents' asserted distinction; instead, they simply refuse to embrace its reasoning. Conversely, none of the district court cases that follow *Gates* and forbid tiering is restricted to the fact pattern that respondents insist limits *Gates*; that is, while the intermediate entity in *Gates* was an organ, not a corporation, all of the courts following *Gates* apply its holding to the more common situation in which the intermediate entity is a corporation, because they recognize that the reasoning of *Gates* applies in either situation. In short, not a single one of the many courts addressing this issue has applied the distinction proffered by respondents, regardless of how they have ruled.

The conflict among the courts of appeals on this issue is real and simply cannot be obscured by respondents. Numerous courts have recognized it. E.g., *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1283 n.13 (11th Cir. 1999) (avoiding issue but noting "a circuit split . . . on the issue of whether a company that is majority-owned by another company that is in turn

owned or controlled by a foreign state can . . . meet the requirement for instrumentality status under section 1603(b)(2)."); *In re Clearsky Shipping Corp.*, 1999 WL 1021825, *2 (E.D. La., Nov. 8, 1999); *Linton v. Airbus Industrie*, 934 S.W.2d 754, 760 (Tex. App. 1996). Numerous commentators have also noted the split.[2] This Court should resolve the question.

C. There is No Other Reason to Deny Review

Both sets of respondents urge that resolution of the tiering issue should await the Ninth Circuit's decision in the *Patrickson* case.[3] The appeal in *Patrickson* should have no effect on review here, however, for three reasons. First, the Ninth Circuit may not even reach the FSIA issue in *Patrickson*. While the Hawaii district court rejected the existence of FSIA jurisdiction, it upheld the existence of federal question jurisdiction and thus denied the plaintiffs' motion for remand. If the Ninth Circuit upholds this decision, then it will not need to reach the FSIA issue at

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[2] See John B. Oakley, *Prospects for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 875 n.49 (1998); Sunil R. Harjani, Comment, *Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 Nw. J. Int'l L. Bus. 181, 187 (1999); Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, 73 Fla. B.J. 48, 50 (1999).

[3] Respondents accuse petitioners of hiding the fact that the *Patrickson* decision is on appeal, asserting that petitioners' counsel and counsel for the plaintiffs in *Patrickson* overlap. As respondents well know, however, this is false: some of the plaintiffs' counsel in *Patrickson* are counsel for three persons who were *intervenors* below in the present case. Petitioners' counsel do not represent any plaintiffs in *Patrickson*, and did not know the status of the case, and plaintiffs' counsel in *Patrickson* do not represent any petitioners.

all, and presumably this is respondents' primary ground for affirmance in *Patrickson*.

Second, if the Ninth Circuit does reach the FSIA question, it will in all likelihood affirm the district court's conclusion, and hold that there is no limitation in *Gates* of the sort defendants argue for. This is so for the reasons that are set forth above and that were recognized by the Hawaii district court. Respondents plead that only then would review of the circuit split be warranted by this Court, because the Ninth Circuit would have "clarified" its position. Not a single one of the courts and commentators cited above has been confused about *Gates'* meaning, however, and to delay review until such a needless "clarification" would be manifestly unfair to the present petitioners. These petitioners face the same circuit split, and far outnumber the plaintiffs in *Patrickson*.

Finally, if the Ninth Circuit does reach the FSIA issue, and if it overrules *Gates*, there will still be a conflict among decisions worthy of this Court's review. As detailed in the petition, the Third Circuit, in dictum attributed to Judge Greenberg, has opposed tiering. That court's statement formed the basis of the decision by a federal court within the circuit to disallow tiering. See *Southern Ocean Seafood Co. v. Holt Cargo System, Inc.*, 1997 WL 539763, *4-5 n.9 (E.D. Pa. 1997) ("the dictum of the Third Circuit . . . [is] persuasive although it is set forth as the view of only judge.") Other district courts likewise take the *Gates* position. Indeed, the multiple diverging decisions from the Southern District of New York – a court which regularly decides issues involving international parties and transactions – alone should warrant review.

The Dole defendants further argue that because the Fifth Circuit took over three years to decide the appeal below, they have waited long enough for a resolution of this case. As ought to be obvious, however, it is petitioners who have suffered grievously from delay, not respondents. The merits of these cases could have been

resolved long ago – petitioners were within six months of their scheduled trial dates in state court when the orchestrated Dead Sea removals occurred in 1994 – had not respondents engineered multiple removals and dismissals to twelve different foreign court systems. Petitioners quite agree that "[n]othing is more wasteful than litigation about where to litigate . . . ," *Massachusetts v. Bowen*, 487 U.S. 879, 927 (1988) (Scalia, J. dissenting), and there has been far too much of this type of litigation in the present case. Respondents are responsible for it, however, and to now urge delay as a reason for avoiding resolution of the important jurisdictional question is disingenuous in the extreme.

Respondents also complain that remand would undo years of proceedings in foreign courts. This is a baseless and particularly dishonest argument. As even respondents concede, the great majority of the claims refiled by petitioners in the foreign countries have been dismissed for lack of jurisdiction – just as had been predicted by the attorneys general or other experts in several of the nations involved. App. 122-23. Although the Dole defendants cite an affidavit of a Ms. Durham, to argue that these dismissals have occurred "in large part because of petitioners' failure to pursue those claims in good faith" (brief in opposition at 8), they neglect to acknowledge that Ms. Durham is simply an in-house counsel for Dole voicing her opinion as an advocate. Not a single one of the foreign courts has ever made a finding, or even a statement, that petitioners pursued any claims, anywhere, in bad faith. Instead, those courts have simply dismissed the cases for the predicted lack of jurisdiction. And while the substantial majority of petitioners have had their claims dismissed by the foreign courts for lack of jurisdiction, in the cases in which dismissal was not ordered, no substantive litigation has occurred in the almost six years since the claims were refiled.

Moreover, it has been obvious from the start that while petitioners were compelled to refile their claims

abroad, they were also appealing the district court's denial of their motion for remand. Petitioners could not choose between refiling and appealing, and were given only 40 days to refile. The fact that respondents succeeded in obtaining an order requiring refiling in foreign courts cannot be used as a reason for denying review of the American proceedings.

II. THE REMOVAL PROCEDURE QUESTION WARRANTS REVIEW

The Dead Sea respondents attempt to explain away the conflict between the decision below and *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), by arguing that "[t]he possibility that these third-party complaints might eventually have been stricken in subsequent state court motion practice did not render Dead Sea Bromine's notice of removal improper (opposition at 15)." This is a subtle attempt to obscure an important point; the third-party complaints would not have been "stricken" in state court, because they were of no effect to begin with. Unless and until the state court granted leave to serve the third-party complaints in the first place, Dead Sea would never be a party, and so there would have been no need to strike any such pleading. E.g., *Bilek & Purcell v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225, 227 (Tex. App. 1985, no writ).

The Dole respondents attempt a similar obfuscation by arguing that "*Murphy Bros.* explicitly recognizes that a court may exercise power over a defendant by either service of process or 'waiver of service by the defendant' (opposition at 21)." *In Murphy Bros.*, however, as in the normal situation, no court scrutiny of the complaint was required; service of process, or waiver thereof, was all that was necessary to make the putative defendant a party with the power to remove. The critical distinction between that situation, and the present case, of course, is that under the Texas Rules, court scrutiny and approval were required before the Dead Sea entities could become

parties. Until that scrutiny happened, they were not parties, and the clear import of *Murphy Bros.* is that removal cannot occur until "one becomes a party officially . . . " *Id.*, 526 U.S. at 350. Similarly, the fact that 28 U.S.C. § 1441(d) "does not refer to a served party, or even the term 'party,' and . . . does not differentiate between parties who have been served and those who have not (opposition at 22), misses the point. The relevant distinction is not between served, and as-yet unserved, parties; it is between parties and nonparties. Until court leave had been granted respondents to add the Dead Sea entities as defendants, they were nonparties, and nonparties cannot remove cases.

CONCLUSION

Petitioners respectfully request that the Court grant a writ of certiorari.

Respectfully submitted,

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